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NOV 3 1945
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 580

WILKY CARRIER CORPORATION,
Petitioner,

vs.

DORIS YOUNG, A MINOR, BY EMIL O. YOUNG, HER FATHER AND NEXT FRIEND, AND EMIL O. YOUNG IN HIS OWN RIGHT; RAYMOND YOUNG, A MINOR, BY EMIL O. YOUNG, HIS FATHER AND NEXT FRIEND, AND EMIL O. YOUNG IN HIS OWN RIGHT; PAULINE YOUNG AND EMIL O. YOUNG,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN J. McDEVITT, JR.,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wilky Carrier Corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered July 26, 1945 (R. 88) not yet reported. (Petition for rehearing denied September 7, 1945.)

A certified transcript of the record in this case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in accordance with Rule 38 of the Rules of this Court.

Summary Statement of Matters Involved

This is a civil action brought by respondents, citizens of New Jersey, to recover from Wilky Carrier Corporation, petitioner, and Earl L. Welty, citizens of New York, damages for injuries to their persons and property resulting from a collision between the automobile of respondent, Emil O. Young, and a tractor-trailer which occurred in Pennsylvania on August 2, 1941.

Respondents averred in their Complaint that the tractor-trailer was owned by Welty and operated on behalf of both defendants. In his Answer, Welty admitted ownership. Both defendants denied liability.

Petitioner and Welty were originally represented by present counsel. Jury trial was demanded. On October 18, 1943, the case was called to trial before Kirkpatrick, J. Petitioner's counsel moved for a continuance on the ground that he was unable to locate his principal witness who was in the army. Welty appeared in court with private counsel. After a discussion it was agreed that the case be tried by Kalodner, J., without a jury, in order to allow petitioner an opportunity to produce the witness (R. 19).

Thereupon, respondents' counsel moved for a voluntary dismissal with prejudice as to Welty on the ground that no case could be proved against Welty (R. 13; 19). Petitioner objected on the ground that such dismissal without previous notice would prejudice its position and deny it an opportunity to bring Welty on the record as a third-party defendant (R. 17 & 67).

At the trial respondents described the accident and their injuries and losses. On the vital question of agency they offered only the fact that the names of both defendants appeared on the door-panel of the tractor, relying on a presumption of ownership and agency arising therefrom (R. 68; 69).

Petitioner showed that the vehicle was registered in the name of Welty and operated by his employee; that petitioner had never employed him. The arrangement between Welty and petitioner required Welty to deliver four automobiles from Buffalo to New York City. This had been done. The accident occurred on the return trip in which petitioner had no interest.

On April 22, 1944, the trial judge made findings in favor of respondents, upon which judgments in the aggregate sum of $13,250 were entered.

On May 17, 1944, petitioner duly appealed to the United States Circuit Court of Appeals for the Third Circuit, and on July 26, 1945, the judgment of the District Court was affirmed.

Jurisdiction

The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

(1) Where plaintiffs were allowed over objection to suffer a voluntary dismissal with prejudice at trial as to a joint defendant primarily liable on their statement that they were unable to prove his liability, can the other defendant be held liable in a derivitive action?

(2) Under the law of Pennsylvania, where, on the basis of the pleadings and proofs it is admitted that A owned a business vehicle, does the presence of the names of both A and B on the vehicle raise a presumption that it was operated by the servant of B?

Reasons for Granting the Writ

The discretionary powers of this Court to grant a writ of certiorari are invoked under and suggested by Rule 38 of this Court:

(1) *Conflict with the decision of another Circuit Court of Appeals.* The Circuit Court of Appeals for the Eighth Circuit has held, in *Portland Gold Mining Co.* v. *Stratton's Independence,* 158 Fed. 63; 16 L. R. A. N. S. 677, that where the immediate actors in a tort were exonerated by a final judgment in their favor, plaintiff is estopped from proceeding against another defendant whose responsibility is necessarily dependent upon that of the immediate actor. In the instant case it is held, in effect, that the dismissal with prejudice, which is such a judgment in favor of the actor defendant, does not prevent the other defendant from being liable.

(2) The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with local decisions as well as its own in holding that the name of a defendant appearing on a business vehicle raises a presumption under Pennsylvania law that the vehicle was operated by his servant and on his business when the pleadings and the proofs show that the vehicle was the sole property of a co-defendant dismissed with prejudice.

In the instant case the Circuit Court of Appeals has held that petitioner, though not the owner of the vehicle, was liable as the operator on the basis of a presumption arising out of the presence of its name as well as the name of the owner on the vehicle. The Pennsylvania decisions, especially *Hartig* v. *American Ice Co.,* 290 Pa. 21, 26 have held that a rebuttable presumption of agency arises in a case where the trade-name of a party is displayed on a busi-

ness vehicle for the reason that the use of a business vehicle is for its owner; that ownership, not the display of the name, raises a presumption that the vehicle was being operated on defendant's business. No decision of a Pennsylvania court has held that such display of a trade-name implies agency where another owns the vehicle and the Trial Judge admitted finding no authority to sustain his contrary position.

The questions presented by this petition are of public importance because the answers thereto may determine how far liability based solely on presumptions can be imposed and contrary pleadings of respondents ignored. Wherefore it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

JOHN J. MCDEVITT, JR.,
Counsel for Petitioner.